

Does "The Aqasia Judgment" conclude whether liability in bulk cargo cases is limited under the Hague Rules?

How about other jurisdictions?

Introduction

1. The issue which arose in *The Aqasia* [2016] 2 Lloyd's Rep. 511 was whether the package limitation provisions in the Hague Rules applies to bulk cargoes.
2. Surprisingly, almost a century after the Hague Rules were agreed, this question remained open as a matter of English law. I hope that it will not spoil the excitement of this talk if I tell you that Sir Jeremy Cooke answered the question "No" – the Hague Rules package limitation does not apply to bulk cargoes. The result is that a carrier has no right to limit in respect of loss or damage to bulk cargoes under the Hague Rules, although of course in extreme cases there may be rights to limit under the 1976 Convention on the Limitation of Liability for Maritime Claims, based on the vessel's tonnage.
3. In this talk I am going to look at the history of package limitation, the basis for Sir Jeremy Cooke's conclusion, and whether there is any prospect of another common-law Court reaching a different view.

Article IV Rule 5 of the Hague Rules

4. The argument that the Hague Rules package limitation applies to bulk cargoes arises from the wording of Article IV Rule 5 of the Hague Rules:

"Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pounds sterling per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading . . ."

5. The crucial words are "per package or unit". For obvious reasons, the carrier in *The Aqasia* did not suggest that the word "package" could apply to a bulk cargo. Rather, it relied on the word "unit". The carrier said that the word "unit" referred to the unit used by the parties to denominate or quantify the cargo in the contract of carriage.

6. In order to understand why that argument was raised, and why it failed, it is necessary to look at the background to the package limitation in Article IV Rule 5 of the Hague Rules, and the way it has been interpreted subsequently.

Early package limitation

7. The earliest limitation by reference to the concept of a “package” of which I am aware is contained in the Carriers Act 1830.
8. Somewhat remarkably, this Act is still in force today, although it has little practical application. By the nineteenth century, English law imposed strict liability upon common carriers for loss or damage to goods during transit. There were only four excepted perils (Act of God, Act of the Queen’s Enemies, Inherent Vice and Fault or Fraud on the part of the owner or consignor of the goods). The burden of showing that the loss or damage was caused by one of these excepted perils lay on the carrier.
9. The strict liability rule operated harshly on common carriers, because they had no right to check packets presented for carriage or to obtain information about their contents. In response, carriers began to post notices excluding or limiting their liability, and the courts generally took the view that these notices were effective if they were put up where the consignor had an opportunity of reading them.
10. The Carrier’s Act sought to rebalance the position between common carriers and the public. It provided that no common carrier for land by hire should be liable for loss or damage to a “parcel or package” containing certain specified articles worth over £10, unless their value was declared at the time of delivery to the carrier and an increased charge paid. If no such notice was given, the carrier’s liability was excluded unless the loss occurred as a result of theft, forgery or embezzlement by the carrier’s employees.
11. Therefore, the relevance of the concept of a “parcel or package” in the Carrier’s Act was that the packaging prevented the carrier from seeing what the goods were before he accepted them for carriage. Nevertheless, it is tempting to suppose that the Carrier’s Act may have inspired the use of the term “package” in the context of limitation of liability for carriage by sea, given the strong influence of English lawyers in that field.

The Conference Form

12. The nineteenth century was the heyday of the doctrine of freedom of contract in English law. At the same time, even after the abolition of the protectionist Navigation Laws in the 1850s, British shipowners still carried the majority of Britain's foreign and intra-imperial trade. By the late nineteenth century, British shipowners habitually included terms in their bills of lading which excluded or limited their common law liability to a large extent. These clauses were upheld by the English Courts, but not by most United States Courts.
13. Those concerned in the shipping industry recognised that there was a need for uniformity and compromise between the interests of shippers and carriers. In 1882, the International Law Association (or "ILA") held a conference in Liverpool at which a standard form of bill of lading was agreed for general use. This form became known as the "Conference Form" and contained many of the elements which would later be found in the Hague Rules. In particular, it contained a package limitation which excepted liability for undeclared goods:

"which are above the value of £100 per package"

Early Legislation

14. In the meantime, various nations introduced legislation to regulate the international carriage of goods by sea on a compulsory basis. The US enacted the Harter Act in 1893. New Zealand legislated by way of the Shipping and Seamen Act 1903 and Australia by the Sea-Carriage of Goods Act 1904. Canada enacted the Water Carriage of Goods Act 1910.
15. Of these pieces of legislation, only the Canadian statute contained a package limitation. S.8 of the Act exempted carriers from liability for undisclosed goods:

"... for a greater amount than one hundred dollars per package ..."

The Imperial Shipping Committee

16. The report of the Imperial Shipping Committee in February 1921 marked a change from the long-standing British position that freedom of contract should prevail in relation to bills of lading without statutory intervention. As Anthony Diamond explained in his important 1978 article on ‘The Hague-Visby Rules’ [1978] LMCLQ 225, it had become recognised that freedom of contract in this area was largely illusory because shippers had no choice but to accept the terms which were offered to them by the shipowners. Further, as goods were increasingly sold on CIF and C&F terms, it was the receivers who were affected by the terms of the bills, and they obviously had no control over them. There was also the problem that while Britain had no legislation in place, its principal dominions (Canada, Australia and New Zealand) had all passed legislation in varying forms, which led to a diversity of approach even within the British Empire.
17. The Imperial Shipping Committee recommended using the Canadian legislation as a model for legislation throughout the British Empire. One of the subjects on which it recommended there should be further provision with regard to was:

“the fixing of maximum values of packages up to which shipowners should be liable to pay”

Genesis of the Hague Rules

18. The Hague Rules were born from a series of conferences, beginning with the Conference of the Maritime Law Committee of the ILA in May 1921.
19. The draft Code submitted to the Hague Conference in late August and early September 1921 contained the following provision:

“Article IV

...

4. Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods for an amount greater than £_____ per package or £_____ per cubic foot or £_____ per cwt (as declared by the shipper and inserted in the contract of carriage, whichever shall be the least) of the goods carried, unless the nature and value of such goods have been declared by the shipper and inserted in the bill of lading . . .”

20. The provision for limitation by reference to volume or weight followed some of the forms of bill of lading in use by that time, such as the bill considered in *Anthony Hordern & Sons, Limited v Commonwealth and Dominion Line, Limited* [1917] 2 K.B. 420.
21. As explained by Sir Jeremy Cooke in the *Aqasia* judgment, the travaux of the Hague Rules show that cargo interests were concerned to be rid of the limitation by reference to volume or weight, because they feared that, with a valuable item in a small package and the limit being the lower of the sums calculated by reference to the package, volume or weight, the owners would be able to restrict liability to very small sums in those circumstances.
22. This position was particularly pressed by M. Leopold Dor, an eminent French jurist. In later life, M. Dor amassed a remarkable collection of marionettes, which can be seen in the World Puppet Museum in Lyons. While his contributions at the conference appear to have predated the frenzied period of collecting between 1927 and 1930 in which he built up his collection, it is perhaps apt that a man who was himself attracted to small but valuable objects which he gathered together from all over the world, should have been the moving spirit behind the removal of a weight or volume limit from the Hague Rules.
23. By the end of 1 September 1921, it appears that M. Dor had prevailed with the result that there was a general consensus on the wording:

“neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods to an amount beyond £100 per package unless the nature of such goods has been declared . . .”.
24. Then came an overnight drafting amendment that gave rise to the argument that carriers advanced in *The Aqasia* that the Hague Rules limit could apply to bulk cargoes.
25. The amendment was introduced by Sir Henry Duke, then an English judge and President of the Divorce, Probate and Admiralty Division. It was to add the words “or unit” after package, so that the carrier was not liable:

“to an amount beyond £100 per package or unit . . .”

26. Sir Henry introduced the amendment by noting that there were goods to which the proposed Code would apply which were not described “as per package”. He said that the drafting committee thought that:

“by adding the words ‘or unit’ the intent would be made clear”

27. The previous day’s discussion, from which the amendment arose, related to items which would typically not be packed before shipment, such as a car and a boiler of 20 tons.
28. In *The Aqasia*, it was accepted that the purpose of this amendment was to cover unpackaged items delivered for shipment, and not to cover limitation by weight or volume, which had been abandoned and never resurrected.
29. Although it may seem surprising now that bulk cargoes were not given particular consideration in the context of limitation, at the time the value of bulk cargoes was so low that limitation was not considered to be necessary for them.
30. The question of limitation was discussed relevantly on two further occasions. In October 1922, a sub-committee chaired by a US Judge proceeded on the basis that limitation did not apply to bulk cargoes because bulk cargoes could not be packages. Again, on 7 October 1923, there was an exchange between Mr Bagge and Sir Leslie Scott which showed that their understanding was that the limitation provision did not apply to bulk cargoes.
31. While it is now accepted that travaux préparatoires are admissible as an aid to the construction of the Hague Rules, it is said that only a “bull’s eye” counts (see *Fothergill v. Monarch Airlines* [1981] AC 251 at 278C per Lord Wilberforce). In *The Aqasia*, Sir Jeremy Cooke did not say expressly whether there was a bull’s eye in the materials which he reviewed. However, at [37] he concludes that it can be seen from the travaux that the underlying intention when including the words “or unit” was to cover items shipped as single units and not packaged in any way, and that bulk cargoes were simply not in mind because of their low value. This does seem to be one of the rare cases, therefore, where the travaux to the Hague Rules are sufficiently clear to be admissible aids to construction.

Enactment: UK and US

32. The Hague Rules were enacted in the UK in the form of the Carriage of Goods by Sea Act 1924. Most British dominions and colonies also put in place corresponding legislation.
33. As you will all know, it took rather longer for the Rules to be enacted in the United States. The history of the US Carriage of Goods by Sea Act 1936 is explained in a 1944 decision of the Maryland District Court, *The Bill* 55 F. Supp. 780 (D. Md 1944).
34. After the Hague Rules were agreed, several successive bills were introduced to enact the Rules in the United States. The limitation clause read variously:
 - (1) "\$100 per package or unit".
 - (2) "\$500 per package or unit".
 - (3) "\$500 per package or, in case of goods not shipped in packages, per customary freight unit"
 - (4) (The phrase "per declared freight unit" was also proposed in the course of the hearings on the various bills)
35. The wording actually enacted was:

"\$500 per package, lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit."
36. The judgment in *The Bill* continues:

"There appear to be no committee reports which clearly explain the quoted phrase "per customary freight unit"; but it seems reasonably clear that the phraseology finally adopted was intended to be more definite than the shorter phrase "per unit" contained in the Hague Rules."
37. The term "per customary freight unit" was initially interpreted by US Courts (as in *The Bill* itself) as referring to the unit of quantity, weight or measurement of the cargo customarily used as the basis for the calculation of the freight rate to be charged. However, more recently, the focus has shifted away from identifying the freight unit

which is customary for the cargo in question, towards the actual freight unit used to calculate freight for the shipment in question.

38. The suggestion that the phrase “per customary freight unit” was intended to be “more definite” than the original phrase in the Hague Rules, “per unit”, leaves open the question whether the wording of US COGSA was intended to make a substantive change to the Hague Rules. This question was addressed by Ritchie J in the Supreme Court of Canada, in the case of *Falconbridge Nickel Mines v. Chimo Shipping* [1973] 2 Lloyd’s Rep. 469. Ritchie J reviewed the legislative history of US COGSA, and concluded that the additional words did constitute a change from the Hague Rules as enacted in Britain and Canada. Consequently, he did not think that they gave any substantial guidance as to the meaning of the words “per package or unit” in Article IV Rule 5 of the Hague Rules.
39. Sir Jeremy Cooke seems to have shared Ritchie J’s view that the wording of US COGSA does not assist in determining the meaning of “per unit” in the Hague Rules. However, it should be noted that the carrier in *The Aqasia* did not rely on US COGSA for this purpose, because the concept of a “customary freight unit” would not have assisted its case. This was because the freight under the relevant charterparty was a lump sum freight and the relevant US authority established that a lump sum freight is simply one freight unit. This would have given rise to a limitation sum of £100 for the entire bulk cargo.

English and Commonwealth Authority

40. There was no English authority directly on the point which the Court had to consider in *The Aqasia*. The most relevant decision was *Studebaker Distributors v. Charlton Steam Shipping Company* [1938] 1 KB 459, which concerned a shipment of 60 unboxed Studebaker cars from Norfolk, Virginia to London. The bill of lading limited liability to US\$250 “each package”. The Court decided that there was no “package” for the purpose of the limitation clause in the bill, because a package meant something which was packed, and the cars were clearly not packed.
41. The Judge did, however, note that the parties could have used the words of the Hague Rules, “package or unit”, if they had wanted to cover any individual piece of cargo. Sir

Jeremy Cooke concluded from that observation that the Judge clearly considered that the words “package or unit” in the Hague Rules covered “any individual piece of cargo” and did not refer to a unit of measurement.

42. Sir Jeremy Cooke also relied on a trio of decisions from Australia, Canada and New Zealand, which he described as authoritative decisions directly on point.
43. The most important of these decisions was *El Greco (Australia) Pty Ltd v. Mediterranean Shipping Co SA* [2004] 2 Lloyd’s Rep. 537. Professor Reynolds once memorably (and aptly) said of this case:

“I recollect once asking an older colleague why a member of our faculty had (long before the recollections of those around today) not had his appointment renewed. The reply was: “Well, if you asked him a question, it was as if you had reached up to the top of a bookshelf to take down a book, and all the books in the shelf collapsed down on to you.”

44. The case concerned the application of the package limit in the Hague-Visby Rules to several hundred thousand posters, made up into 2,000 packages and stuffed into a container. The key passage from the judgment of Allsop J (in the majority together with Black CJ) was para.278:

“. . . The terms of art IV, r 5 of the Hague Rules were negotiated and agreed upon as a package limitation [. . .] The addition of the words ‘or unit’ can be seen to have been intended to clarify the rule by making unnecessary any debate in individual cases about the extent and nature of wrapping and the like, so that individual articles capable of being carried without packaging – boilers, cars and the like, and which could be seen as units of cargo as shipped – would be covered. This approach involves a rejection of the notion that ‘or unit’ was inserted to cover bulk cargo by reference to freight unit, as in US COGSA. The weight of judicial and other views that I have earlier referred to makes this a safe conclusion.”

45. The second decision was the Canadian case of *Falconbridge*, to which reference has already been made. Cargo in that case had submitted that the word “unit” in the Canadian equivalent of the Hague Rules referred to a unit of freight (that is to say the unit of measurement used to calculate the freight). Ritchie J rejected that submission and held that the word “unit” meant “a shipping unit, that is a unit of goods”. Consequently, *Falconbridge* was directly in point for the issue in *The Aqasia*.

46. The third decision was *New Zealand Railways v. Progressive Engineering Company Ltd* [1968] NZLR 1053. That case concerned pieces of angle iron tied into two bundles. It was held that each bundle was a package for the purposes of the Government Railways Act 1949, which contained a limit of £20 “for any package or unit”. In the course of his judgment, after referring to *Studebaker*, Tompkins J said:

“a package imports the notion of articles packed together as these were. A unit on the other hand, imports something which is a separate thing, such as a single manufactured article, though of course any single article, if accepted for transport as a separate article, would be a unit.”

Is *The Aqasia* conclusive for English law?

47. That brings me to the first of the two questions which have been set for me: Is *The Aqasia* conclusive for English law on the question whether liability in bulk cargo cases is limited under the Hague Rules?

48. In my view, the judgment in *The Aqasia* ought to be conclusive of the question in English law.

49. The travaux to the Hague Rules are compelling evidence that the word “unit” was inserted into what became Article IV Rule 5 in order to address the issue of articles of cargo which were shipped as such, without packaging, and might therefore not be regarded as “packages”. There is no suggestion that the word was intended to refer to units of measurement of weight or volume.

50. The Commonwealth authorities relied upon by Sir Jeremy Cooke are authoritative, particularly the Canadian case of *Falconbridge*. There is no English authority pointing the other way. The decision in *Studebaker* points towards the conclusion reached in *The Aqasia*.

51. The authors of text books and commentaries either sit on the fence, or incline towards the view that the word “unit” does not refer to freight units.

52. In any event, the two interpretations of the meaning of “unit” found in the text books are, first, the freight unit, i.e. the unit of measurement used to calculate the freight, and second, the shipping unit, i.e. the physical unit received by the carrier from the shipper.

53. If “unit” refers to the unit of measurement used to calculate the freight, the result will depend upon the fortuity of the way that the freight has been calculated in that particular case. As already noted, that point is illustrated by the facts of *The Aqasia* itself. The carrier did not contend that the unit of measurement used to calculate the freight was relevant, because this would have resulted in an unpalatably low limitation figure. Instead, it sought to rely on a third way, namely the unit of measurement expressed for the cargo in the charterparty.
54. Taking the unit of measurement expressed for the cargo in the contract of carriage is as problematic as taking the unit of measurement used to calculate the freight. In *The Aqasia* itself, the charterparty referred to the cargo in tons, but the bill of lading used kilograms. We will all no doubt also be familiar with tanker bills of lading which state the weight or volume of the cargo in several different ways. As Sir Jeremy Cooke observed, it is highly unsatisfactory that a limitation amount should depend upon the happenstance of the way that the cargo is described.
55. The carrier’s case had the further unattractive feature, in that it was said that the word “unit” could also refer to unpackaged physical items. This would create further problems, particularly where the weight or volume of such an item was stated on the bill of lading: which limitation figure would apply – that attributable to the item as a single unit of cargo, or that attributable to the units of measurement used to describe the weight or volume of the cargo?
56. Consequently, not only does the decision in *The Aqasia* follow the travaux and relevant Commonwealth authority, but it also has the virtue of commonsense, or rather avoiding an outcome that lacks commonsense and is not mandated by the language of the Hague Rules.

Other Jurisdictions?

57. Commonwealth Courts generally lean towards interpretations of the Hague Rules which are consistent with those adopted in other jurisdictions, where this is possible and reasonable.
58. In circumstances where the conclusion in *The Aqasia* is based on authoritative decisions of the Courts of Canada, Australia and New Zealand, it seems very unlikely

that the Courts of those jurisdictions will reach a different conclusion. Indeed, *Falconbridge*, as a decision of the Supreme Court of Canada, appears to be binding authority on the point for all Courts in Canada below the Supreme Court.

59. It is striking that these questions do not appear to have been considered directly by the Courts of Hong Kong and Singapore. However, the strength of the reasoning underlying *The Aqasia* suggests to me that a carrier arguing for a different result before those Courts may find the going difficult.

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